

8/13/93

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
UNITED STATES POLLUTION)	Docket No. TSCA-PCB-VIII-92-18
CONTROL INC., AN OKLAHOMA CORP.)	
and)	
UNITED STATES POLLUTION CONTROL)	
INC., AN OKLAHOMA CORP. d/b/a)	
USPCI IN UTAH,)	
)	
Respondent)	

ORDER GRANTING COMPLAINANT'S MOTION TO
WITHDRAW COMPLAINT WITHOUT PREJUDICE

For the reasons stated in its motion of April 1, 1993, complainant seeks to withdraw the complaint in the subject matter without prejudice. Complainant seeks voluntary dismissal without prejudice "because, if information not presently known to Complainant becomes available, Complainant may wish to reinstate this action." In its response to the motion served April 15, 1993, respondent is of a view that the complaint should be dismissed with prejudice. For the reasons mentioned in the response, respondent is of a mind that "Complainant has had ample time to develop all available information Respondent has expended considerable time and effort and incurred substantial costs in its defense of this action to date. Accordingly, Complainant should be precluded from reinstating this action at a later time." The Consolidated Rules of Practice (Rules) provide that a complainant may file a motion to withdraw a complaint, or any part thereof, without prejudice. The Administrative Law Judge (ALJ) is unable to locate

any provision, nor have the parties directed his attention to such in the Rules, which provide that a respondent may move to dismiss a complaint with prejudice. Thereof, it is necessary to turn elsewhere for a solution.

Administrative agencies are not bound by the standards of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), and they traditionally enjoy "wide latitude" in fashioning their own rules of procedure.¹ Although such agencies generally are unrestricted by the technical or formal rules of procedure which govern trials before federal courts, rules such as the Fed. R. Civ. P. often guide decision making in the administrative context. Dismissal of actions is treated under Fed. R. Civ. P. 41. If a plaintiff moves for a dismissal and asks that the dismissal be without prejudice, the matter is left to the discretion of the court. It may grant the dismissal without prejudice or it may allow the dismissal only on condition that it be with prejudice to a further action on the same claim.² Dismissal without prejudice should be allowed unless defendant will suffer some prejudice other than the mere prospect of a second lawsuit. That plaintiff may obtain some tactical advantage by dismissal is insufficient; substantial prejudice to the defendant is the test. Where substantial prejudice is lacking,

¹ See, e.g., In the Matter of Katzson Brothers, Inc., FIFRA Appeal No. 85-2 (Final Decision, November 13, 1985); Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356 n.3 (E.D.N.Y. 1982); and Silverman v. Commodities Futures Trading Commission, 549 F.2d 28, 33 (7th Cir. 1977).

² Wright & Miller, Federal Practice and Procedure: Civil § 2367 at 184 (1971).

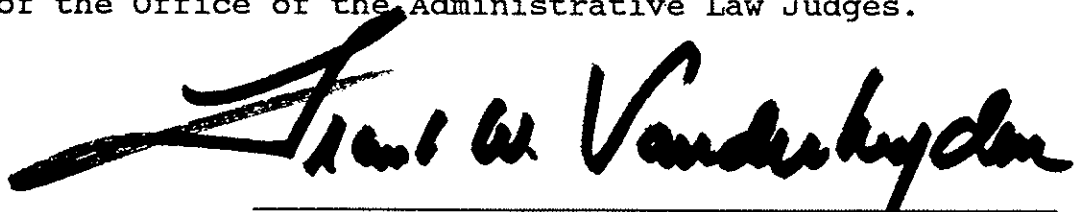
the court should exercise its direction by granting a motion for voluntary dismissal without prejudice.³

This matter is in its incipient stages with only the complaint, answer and the motion being the meaningful pleadings served to date.

A plaintiff has an unqualified right to dismiss his complaint unless some legal prejudice will result to the defendant other than the prospect of a second litigation upon the subject matter. Jones v. Securities and Exchange Commission, 298 U.S. 1 (1935). Respondent has failed to establish to the satisfaction of the ALJ sufficient legal prejudice or harm to grant the motion only "with prejudice." Further, a dismissal or withdrawal "with prejudice" is a harsh sanction and should be resorted to only in extreme cases. Chorn v. United States, 4 Cl. Ct. 666 (1984). This is not such a case.

IT IS ORDERED that the motion be GRANTED and complainant be permitted to withdraw the complaint without prejudice.

IT IS FURTHER ORDERED that the subject case be removed from the docket of the Office of the Administrative Law Judges.



Frank W. Vanderheyden
Administrative Law Judges

Dated: May 13, 1993

³ 5 Moore's Federal Practice ¶ 41.05[1].

IN THE MATTER OF UNITED STATES POLLUTION CONTROL, INC., AN OKLAHOMA CORP. and UNITED STATES POLLUTION CONTROL, INC., AN OKLAHOMA CORP., d/b/a USPCI IN UTAH, Respondent,
Docket No. TSCA-PCB-VIII-92-18

Certificate of Service

I certify that the foregoing Order, dated 5/13/93, was sent this day in the following manner to the below addressees.

Original by Regular Mail to:

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Marion Walzel
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Legal Staff Assistant

Dated: May 13, 1993